No. 03-761

Supreme Court, U.S.
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In The

Supreme Court of the United States

RANCHO VIEJO, LLC,

Petitioner,

v.

GALE A. NORTON, Secretary of the Interior, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the D.C. Circuit's decision holding, on grounds that conflict with a recent decision of the Fifth Circuit, that Congress may, through the Endangered Species Act, authorize the regulation of private lands to protect against theoretical harm to the habitat of the wholly intrastate and commercially-irrelevant arroyo toad is contrary to this Court's recent Commerce Clause decisions in *United States v. Lopez*, *United States v. Morrison*, *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, and *United States v. Jones*.

LIST OF PARTIES

Petitioner:	Rancho Viejo, LLC, is a California limited liability corporation that has never issued shares to the public. It does not have a parent corporation, nor is there any publicly-held company that owns ten percent or more of its stock.
Respondent:	Gale A. Norton, Secretary of the Interior; the United States Department of the Interior; the United States Fish and Wildlife Service; the United States Army Corps of Engineers; and Colonel Richard G. Thompson, Los Angeles District Commander, United States Army Corps of Engineers.
Amicus Curiae:	Mountain States Legal Foundation; the following additional entities participated as *amici curiae* in the Court of Appeals or in the District Court: the National Wildlife Federation and the Pacific Legal Foundation.

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AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONER

Mountain States Legal Foundation ("MSLF") respectfully submits this *amicus curiae* brief in support of Petitioner, Rancho Viejo, LLC. Pursuant to Supreme Court Rule 37(2)(a), this *amicus curiae* brief is filed with the written consent of all the parties.[1]

IDENTITY AND INTEREST OF *AMICUS CURIAE*

MSLF is a non-profit, membership public interest law foundation dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberties, the right to own and use property, limited and ethical government, and the free enterprise system. MSLF's members include businesses and individuals who live and work in nearly every state of the country. A large number of MSLF's members work in businesses involved in the utilization and development of natural resources and, as a result, are involved actively in many environmental issues. Moreover, MSLF and its members have an interest in ensuring that federal laws and regulations, including the Endangered Species Act, are implemented

[1] Copies of the consent letters have been filed with the Clerk of the Court. In compliance with Supreme Court Rule 37(6), MSLF represents that no counsel for any party authored this brief in whole or in part and that no person or entity, other than MSLF, made a monetary contribution for the preparation or submission of this brief.

and enforced in a manner consistent with the Constitution of the United States.

SUMMARY OF ARGUMENT

The Commerce Clause gives Congress the authority to "regulate Commerce with foreign Nations, and among the several States . . . ." U.S. Const. art. I, § 8, cl. 3. The scope of congressional authority under the Commerce Clause is the subject of heated debate and litigation within the courts. In particular, the Endangered Species Act of 1973 ("ESA"), 16 U.S.C. § 1531, *et seq.*, raises concerns regarding whether various intrastate activities sufficiently affect interstate commerce to permit Congress to "regulate" them. Thus, in determining whether the Commerce Clause authorizes regulation of various endangered or threatened species under the ESA, the determinative issue is whether those species individually affect interstate commerce.

Ignoring this determinative issue and contrary to precedents of this Court, the D.C. Circuit upheld the federal government's regulation of an activity that neither affects interstate commerce nor constitutes commerce under the Commerce Clause. Specifically, the D.C. Circuit allowed the U.S. Fish and Wildlife Service (the "Service") to exceed the scope of the Commerce Clause by extending Section 9(a)(1)(B) of the ESA, 16 U.S.C. § 1538(a)(1)(B), to a wholly intrastate, non-commercial species, the southwestern arroyo toad (*Bufo microscaphus californicus*). The result is intrusion on state sovereignty, the obstruction of state control of local land use, and seemingly unlimited federal regulatory power over species. This result conflicts with precedents of this Court and of the Fifth Circuit, *e.g.*,

GDF Realty, Inc. v. Norton, 326 F.3d 622 (5th Cir. 2003), and warrants *certiorari* to limit congressional authority to regulate species solely to the extent permitted by the Commerce Clause.

ARGUMENT IN SUPPORT OF PETITION

I. THE CONSTITUTION OF THE UNITED STATES REQUIRES A DISTINCTION BETWEEN THAT WHICH IS TRULY NATIONAL AND THAT WHICH IS TRULY LOCAL.

The D.C. Circuit's holding that Congress has the authority, under the Commerce Clause of the Constitution, to authorize, through the ESA, the regulation of private lands to protect the wholly intrastate and commercially-irrelevant arroyo toad has stretched the Commerce Clause to the point of providing federal agencies unlimited power to regulate all state and local land use activity.

The D.C. Circuit's decision is based primarily on a prior decision of the Circuit in *National Association of Home Builders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997) ("*NAHB*"). Pet. App. 1a-31a. In *NAHB*, by a two-to-one decision, the D.C. Circuit held that Congress has authority, under the Commerce Clause, to prohibit the private taking of an endangered species that existed wholly in one state and did not directly generate any significant interstate commerce. *NAHB*, 130 F.3d at 1046-49. The D.C. Circuit's holdings disregard totally this Court's Commerce Clause jurisprudence and will, if allowed to stand, permit

the ESA and its "take" provisions to regulate private property in every State of the Nation.[2] That is the result of the D.C. Circuit's holdings because, as Judge Wald of the D.C. Circuit noted in *NAHB*: "Approximately [half of the] species in the United States currently designated as threatened or endangered [under the ESA] are found in only one state." *NAHB*, 130 F.3d at 1052.

In *United States v. Lopez*, 514 U.S. 549 (1995), this Court held that a federal statute regulating intrastate gun possession exceeded congressional power under the Commerce Clause. This Court held that the Gun-Free School Zones Act of 1990 ("GFSZA"), which made possession of a gun within a school zone a federal offense, exceeded Congress' authority under the Commerce Clause. *Lopez*, 514 U.S. at 559-67.

This Court reasoned that such non-economic intrastate activity was outside the scope of the Commerce Clause and within the purview of State control, *Id.* at 567-68, because congressional authority under the Commerce Clause is limited to "economic activity" that has substantial effects on interstate commerce. *Id.* at 559-63.

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[2] Section 9(a)(1)(B) of the ESA makes it unlawful to "take" any species listed as endangered or threatened without a permit. 16 U.S.C. § 1538(a)(1)(B). The ESA defines "take" to mean "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." *Id.* at § 1532(19). Moreover, "harm" has been defined to include "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding." 50 C.F.R. § 17.3; *see also, Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 708 (1995).

Lopez determined that, under the Commerce Clause, Congress could regulate three categories of activity: (1) the use of the channels of interstate commerce; (2) the instrumentalities of interstate commerce, or persons or things in interstate commerce; and (3) activities that have a substantial affect on interstate commerce. *Id.* at 558-59. This Court concluded that possession of a gun is not primarily an economic activity and, therefore, did not fall under the first two categories. *Id.* at 559. In addition, this Court determined that gun possession was not an activity that "substantially affects" interstate commerce because it was not an essential component of interstate economic activity. *Id.* at 561. Moreover, the GFSZA lacked a jurisdictional statement that would have limited its application to cases involving interstate commerce. Furthermore, Congress failed to make any findings about the affect, if any, of gun possession in school zones on interstate commerce. *Id.* at 562-64. Accordingly, gun possession within school zones did not have a substantial impact on interstate commerce. *Id.* at 567-68.

The focal point of this Court's reasoning in *Lopez* rested on the activity that was to be statutorily regulated, *i.e.*, the possession of a gun within a school zone, and not on the separate activities of the actor himself that may only involve attenuated matters of interstate commerce. In the instant case, the D.C. Circuit did not direct its attention to the activity that is to be statutorily regulated, *i.e.*, the "take" of an arroyo toad, but instead shifted its focus away from the reasoning of this Court in *Lopez* and toward the economic nature of Rancho Viejo itself. Pet. App. 16a-17a. Under this rationale of the D.C. Circuit, this Court would have been required to focus on the possessor of a gun within a school zone and whether or not that individual was involved in any activities that might affect interstate

commerce. Clearly, such a far-reaching inquiry would allow the federal government unimpeded regulatory power, including the ability to tread on areas of traditional state control, under the Commerce Clause. This was not the intention of this Court's landmark decision in *Lopez*.

In *Lopez*, this Court suggested that, whenever federal legislation attempted to regulate areas traditionally regulated by state or local governments, it would review that congressional legislation with caution. *Id.* at 557-68. Foretelling the scrutiny it would apply, this Court rejected in *Lopez* the "costs of crime" and "national productivity" justifications for the GFSZA proffered by Congress both because, had it accepted those justifications, it would be "difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign," *Id.* at 564, and because such a broad reading of the Commerce Clause would undermine the federal system of government. *Id.* at 561, n.3, 564, 567-68.

Likewise, in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001) ("*SWANCC*"), congressional authority under the Commerce Clause was also tested. In *SWANCC*, this Court addressed whether the Environmental Protection Agency ("EPA") and the Army Corps of Engineers ("the Corps") could regulate isolated intrastate waters and wetlands that are not connected or adjacent to navigable waters "based on their actual or potential use as habitat for migratory birds." *SWANCC*, 531 U.S. at 163-64. This Court held that the migratory bird regulation was invalid because Congress did not intend to include "isolated" wetlands or waters within the term "navigable waters" when it enacted the Clean Water Act. *Id.* at 162-63.

Although the *SWANCC* decision did not decide whether federal regulation of isolated intrastate wetlands exceeded congressional authority under the Commerce Clause, this Court did suggest that the Corps' interpretation may have exceeded that authority. *Id.* at 172-73. This Court indicated that the Corps' regulation of isolated intrastate wetlands would raise serious questions under the Commerce Clause because local land use regulation is a traditional state and local function. *Id.* at 172-74. Even though previous cases had found that migratory bird protection was a "national interest of very nearly the first magnitude," this Court determined it was "not clear" whether the regulated activity or object, in the aggregate, affects interstate commerce. *Id.* at 173 (quoting *Missouri v. Holland*, 252 U.S. 416, 435 (1920)). Because there was no clear statement in the Clean Water Act that Congress intended to give the federal government authority over isolated wetlands, this Court refused to interpret the regulation to include "federal jurisdiction over ponds and mudflats falling with the 'Migratory Bird Rule' [that] would result in a significant impingement of the States' traditional and primary power over land and water use." *Id.* at 174.

This Court's holdings in *Lopez* and *SWANCC* control in this matter. The listing of the arroyo toad as an endangered species under the ESA and the application of the ESA's "take" provisions to the toad substantially intrudes on the sovereign power of the State of California to control local land use – an area of traditional state concern. *See, FERC v. Mississippi*, 456 U.S. 742, 768 n.30 (1982) (The regulation of land use is the most prominent activity of any State). Justice Kennedy, concurring in the *Lopez* decision, argued that courts should be hesitant in allowing

Congress to use the Commerce Clause as the basis for federal regulation in an "area of traditional state concern," which "States lay claim [to] by right of history and expertise." *Lopez*, 514 U.S. at 580, 583 (Kennedy, J., concurring). Justice Kennedy elaborated that, with such an expansive definition of the Commerce Clause, "the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory." *Id.* at 577.

Thus, the D.C. Circuit's ruling upholding the application of Section 9(a)(1)(B) of the ESA to the alleged "take" of arroyo toads by Rancho Viejo intrudes on state sovereignty and obstructs state control of local land use. Accordingly, the decision of the D.C. Circuit is inconsistent with this Court's Commerce Clause precedent and warrants *certiorari*.

II. THE AGGREGATION OF ALL ACTIVITIES BROADENS THE SCOPE OF CONGRESSIONAL AUTHORITY UNDER THE COMMERCE CLAUSE WITH NO LOGICAL STOPPING POINT.

The Commerce Clause empowers Congress to regulate three categories of activity provided that Congress identifies an adequate relationship between those categories of activity and interstate commerce. *See supra*. The D.C. Circuit ignored the limits imposed by the Commerce Clause by aggregating all of the activity, including non-economic activity, engaged in by Rancho Viejo so as to provide a basis for the D.C. Circuit's holding. Pet. App. 15a. By its aggregation of all activity, including activities of both an economic and a non-economic nature, the D.C. Circuit's limit on the scope of congressional authority under the Commerce Clause has no logical stopping point.

In *United States v. Morrison*, 529 U.S. 598 (2000), this Court held that the Violence Against Women Act ("VAWA"), a federal statute penalizing intrastate gender-based violence, intruded on traditional state authority over criminal matters and thus exceeded the scope of the Commerce Clause. This Court found that, like the GFSZA in *Lopez*, the VAWA was beyond the scope of the Commerce Clause because the activity regulated was essentially non-economic and related to interstate commerce only indirectly. *Morrison*, 529 U.S. at 613-19.

Adhering to the scrutiny utilized in *Lopez*, this Court in *Morrison* emphasized that "in those cases where we have sustained federal regulation of intrastate activity based upon the activity's substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor." *Id.* at 611. Furthermore, this Court "reject[ed] the argument that Congress may regulate non-economic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce." *Id.* at 617. The reason was simple: allowing aggregation of non-economic activities to serve as a basis for regulation under the Commerce Clause would allow the federal government to regulate any and every activity. *Id.* at 615-17.

Moreover, permitting Congress, under the Commerce Clause, to justify legislation by aggregating non-economic activities would "completely obliterate the Constitution's distinction between national and local authority." *Id.* at 615. For example, the aggregation of non-economic activities could be applied just as easily "to family law and other areas of traditional state regulation since the aggregate effect of marriage, divorce, and childrearing on the national economy is undoubtedly significant." *Id.* at 615-16. *Morrison* found that the VAWA impermissibly intruded on

traditional state authority over family law and criminal issues. As in *Lopez*, this Court emphasized, in *Morrison*, that courts should carefully evaluate federal legislation that relies on the Commerce Clause for its authority because "[t]he Constitution requires a distinction between what is truly national and what is truly local." *Id.* at 599.

The D.C. Circuit's holding conflicts with the decisions of this Court in *Lopez* and *Morrison*, where the notion of aggregating all activity, including non-commercial activities, to determine whether interstate commerce is affected was rejected. *See, Lopez*, 514 U.S. at 564; *Morrison*, 529 U.S. at 615-17. Furthermore, the D.C. Circuit's holdings also conflict with that of the Fifth Circuit, which has adopted the rationale of this Court in *Lopez* and *Morrison* regarding a similar challenge under the ESA involving a wholly intrastate, non-commercial species. *See, GDF Realty, Inc. v. Norton*, 326 F.3d 622 (5th Cir. 2003). The Fifth Circuit specifically noted that Commerce Clause precedent of this Court "stand[s] against" the notion that "[n]on-economic and non-commercial activity could be aggregated" to determine a substantial effect on interstate commerce. *Id.* at 638. To hold otherwise would permit the federal government infinite authority, under the Commerce Clause, to regulate any activity. There would be no logical stopping point to federal legislation; any statute could satisfy the Constitutional limitations of the Commerce Clause.

Accordingly, *certiorari* is warranted in this case to resolve the conflict between this Court and the Circuit Courts regarding the proper and just level of economic and commercial activity that may be aggregated in determining whether the application of Section 9(a)(1)(B) of the

ESA to the arroyo toad substantially effects interstate commerce.

CONCLUSION

For the foregoing reasons, Mountain States Legal Foundation respectfully requests that this Court grant Rancho Viejo's Petition for *Writ of Certiorari*.

Respectfully submitted,

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